Short Form Order

Index Number: 1477-2007

Supreme Court - State of New York
I.A.S. Term, Part 23, Suffolk County

Present:
HON. EMILY PINES
Justice Supreme Court

Original Motion Date: 03-05-2007
Motion Submit Date: 01-31-2008
Motion Sequence No.: 003 MG
CASEDISP

X

BRIDGEVIEW AT BABYLON COVE HOME OWNERS ASSOCIATION, INC.,

Plaintiff,

-against-

INCORPORATED VILLAGE OF BABYLON,

Defendant.

X

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Defendant, the Incorporated Village of Babylon (Village) moves, by Notice of Motion (motion sequence number 003), to dismiss the Complaint brought by Bridgeview at Babylon Cove Home Owner's Association, Inc. (HOA).

This lawsuit arises out of an application by Babylon Cove Development LLC (a developer) and approval by the Village Trustees, Zoning Board and Planning Board, of a plan to construct 22 town house condominium dwelling units within the Village of Babylon. As part of the approval process, which culminated in final approvals of a change of zone by the Board of Trustees from Marine Commercial to Residential, a variance by the Village Board of Zoning Appeals and a subdivision by the Village Planning Board in 2002, the developer was required to accept certain Covenants and Restrictions. By Resolution, dated April 23, 2002, the Village Board of Trustees granted the developer's change of zone application, subject to certain Covenants and Restrictions, including one which required that all of the approved dwelling units must be owner occupied. By resolution in April, 2002, the Zoning Board of Appeals granted the developer variances subject to execution of this same covenant and restriction; and by vote of May 30, 2002, the Village Planning Board approved the developer's application for subdivision, also conditioned upon execution of the covenants and restrictions. All of these public

records are attached to the Village's motion papers as **Exhibits C, D** and **E**. The condition at issue reads as follows: "(a)ll dwelling units shall be owner occupied only. Rental shall not be permitted". Thereafter, on August 7, 2002, Babylon Cove Development LLC, by its officer and shareholder, Michael J. Posillico, executed a Declaration of Covenants, Restrictions, Licenses and Easements containing the restrictions set forth by the various Village Boards, and specifically, the restriction that the 22 units be owner occupied. Condition # 22, signed by the developer states, in pertinent part "(t)he above-mentioned covenants and restrictions shall be and constitute real covenants running with the land and shall be binding upon the Declarant and any and all su bsequent owners and/or any Homeowner Associations of said real property . . . ." In addition, condition # 35, executed by the developer's principal, provides, in pertinent part, that the various Boards reserve the right to rescind the approvals in the event the developer fails to execute the Declaration of Covenants within 3 days of forwarding to the developer by the Village "(i)n order that it may be recorded in the county clerk's office and the applicant pays any and all necessary recording costs. . . . " However, for whatever reason, the developer never filed the Declaration of Covenants in the Office of the County Clerk.

Thereafter, the developer subdivided, constructed and sold the subject parcels, except for two which remain in the d eveloper's name, to various individuals. The developer created the HOA, naming members of the developer as its first Board of Directors (**Exhs. A** and **B** to the **Posillico Affidavit**). By the terms of its own By-Laws, the HOA remains under the control of the developer as long as the developer owns a single unit in the condominium development. However, neither the developer's Offering Plan, nor the Homeowner's Association of the condominium development has recognized nor filed the contested covenant , restricting the units sold to being owner occupied. Rather, the developer created and filed an Offering Plan and sold condominium units all giving their owners the right to rent their units, in direct contravention of the above covenant. The developer also executed and filed a Declaration of Covenants, permitting such rental use , executing the same and filing with the County Clerk on January 16, 2004. Following that date, the developer sold twenty of the twenty-two units. The HOA, the only named Plaintiff in this action, asserts that the individual homeowners all purchased their units with the understanding that they would be permitted to rent the same. No individual homeowner, other than the developer, through its shareholder Michael Posillico, has joined or participated in this litigation.

In 2005, the Village became aware of the disparity between the covenants and restrictions adopted by the various boards and executed but not recorded by the developer and those actually recorded by the developer. It then approved a resolution, hiring special counsel to take action to enforce the Covenants and Restrictions, including the commencement of litigation and revocation of certificates of occupancy, issued in violation of this restriction. Thereafter, at the request of Village officials, many of the individual homeowners have executed the original covenants and restrictions containing the subject anti rental provision, and filed same. The HOA (still controlled by the developer) has refused to do so and has refused to call a meeting for this specific purpose. In this context, a somewhat personal dispute appears to have arisen between Special Counsel to the Village. who represented one of the unit purchasers, and the developer, concerning the roofing in one of the units. Michael Posillico, a member of the developer and an officer of the HOA Plaintiff claims that this dispute gave rise to the Village's actions.

The HOA commenced this action, which essentially seeks declaratory and injunctive relief against the Village, asserting that the original restriction was only intended to apply to the developer; that the anti-rental provision violates the Village Code which permits rentals under certain conditions; that the restriction was forced upon the individual homeowners through fraud and duress; and that the HOA is entitled to damages due to the Village's prior action. The Village moves to dismiss the Complaint pursuant to **CPLR § 3211 (a)** arguing, *inter alia*, 1) the HOA lacks standing to sue on behalf of individual homeowners, who are the only parties in interest regarding the claims of fraud and duress; 2) any claim by the HOA, which is the alter ego of the developer, is barred by documentary evidence demonstrating that the Village boards duly adopted and the developer executed the Covenants and Restrictions that were made part of its original approved applications; 3) the Complaint fails to state a cause of action because the developer waived any rights under the Village Code by agreeing in writing to the Covenants and Restrictions; and 4) that anti-rental provisions as a condition to a zoning change are a proper exercise of the Village's zoning power. In essence, the Village asserts that, upon execution of the Covenant, which was made a condition to the grant of a change of zone, variance and subdivision approvals, the developer, which controls the Plaintiff herein, cannot be heard now to state that such covenants cannot be enforced, are unfair and/ or have caused the HOA damages.

The HOA argues, through the Affidavit of Michael Posillico, 1) that he understood the covenant only to apply to the developer and not to subsequent purchasers of the property; 2) that the Village Code permits rental of residential property and, therefore, such a restriction is in violation thereof; 3) that the restriction, in any case, cannot bind subsequent purchasers since the only filed covenant upon purchase of the units was that permitting rental; and 4) that the restriction is both unlawful and unconstitutional.

CPLR § 3211 (a)(1) provides that a party may move for judgment, dismissing one or more causes of action asserted on the ground that "a) defense is founded upon documentary evidence". The documents set forth in the papers annexed to the affidavits on behalf of both parties demonstrate the following:1) the developer received the benefit of zoning approvals based upon a requirement that it comply with certain conditions; 2) among the conditions to be followed and stated to run with the land is one that the 22 units are to be owner occupied and that no rental units are permitted; 3) the developer's officer and shareholder acknowledged such requirement by executing the same; 4) the covenants, by their terms, required the developer to be the one responsible for their recording with the Suffolk County Clerk; 5) the developer formed the HOA; 6) by the terms of its By-Laws, the HOA is controlled by the developer because it continues to own and hold units; 7) the developer and the HOA, in derogation of the developer's agreement to be bound by the covenants and restrictions, altered them and filed a covenant in contravention thereof permitting the 22 units to allow for rental.

Based on the above, taken together, Plaintiff's Complaint, which seeks to prohibit the Village from enforcement of the subject restrictions must fail, unless the restriction is itself unlawful and/or unconstitutional. In sum, unless the covenant is otherwise unenforceable against the developer and the HOA, which, in this instance, is made up of the same entity, the Court rejects Plaintiff's arguments that it somehow misunderstood and/or is not bound by that which it agreed to in clear executed documents. If the Court were to take Plaintiff's assertion to its illogical extreme, the posed argument that the restriction only applied to the developer, as opposed to the ultimate home owners, would lead to the conclusion that other restrictions, such as # 59 "(t)he hanging of clothes outside shall be prohibited" would only be applied to the clothes belonging to Mr. Posillico or other members of the developer as opposed to those of the ultimate home owners. The documents submitted are subject to only one interpretation; and if they are otherwise lawful, they should be enforced.

It is generally held that a municipality may impose appropriate conditions as part of a change of zone, as well as a grant of a variance. ***see, Matter of St Onge v Donovan***, 71 NY 2d 507, 527 NYS 2d 721, 522 NE 2d 1019 (1988); ***Matter of Dexter v Town Board***, 36 NY 2d 102, 365 NYS 2d 506, 324 NE 2d 870 (1975). Such conditions must, however, be both reasonable and directly related and incidental to the proposed use of the property. ***Matter of Onge, supra***. While sometimes described as "conditional zoning", this process is lawful and may be accomplished by the municipality actually conditioning the change of zoning district classification upon the execution by the applicant/developer of a declaration restricting the use of the property by those private parties interested in the rezoning. ***see, Collard v Incorporated Village of Flower Hill***, 52 NY 2d 594, 439 NYS 2d 326, 421 NE 2d 818 (1981). Once these conditions are incorporated into the amending ordinance, which they were in this case, those conditions effectively become part of the zoning law. ***see Collard, supra***. As long as the conditions are consistent with the purposes of zoning, they are binding on successor owners, at least to the extent that the original grantee and grantor so intended; that there was privity between the party claiming the benefit and the burdened party and that the covenant touches and concerns the land with which it runs. ***Neponsit Property Owners' Association v Emigrant Industrial Savings Bank***, 278 NY 248, 15 NE 2d 793. It is for this reason that Plaintiff's argument concerning the **Village Code** must fail. While **Village Code § 281** sets forth a process for obtaining a rental permit within the Village, it does not replace the **zoning code**, which will set forth where such activity is and is not permitted.

Despite all of the above, Plaintiff does make one argument which requires, in this Court's view, serious consideration. The imposition of owner occupancy as part of a zoning code or a special permit or use has, under the above cited standards, been both upheld and rejected by various jurisdictions. A Pennsylvania court found such a condition invalid, as applied to a special permission to construct a three unit apartment building. ***Kulak v Zoning Hearing Board of Bristol Tp.***, 128 Pa Commw. 457, 563 A 2d 978 (1989). Yet, a Maryland court upheld the validity of a zoning restriction on a private community beach that allowed use only by neighboring property owners on the basis that non owners would not likely be responsible toward the neighboring area and community. ***see, Delbrook Homes v Mayers***, 248 Md. 80, 234 A. 2d 880 (1967). New York has, in those cases which have touched upon the issue, only upheld such requirements albeit in different contexts. Thus, in ***Finger v Levensen***, 163 AD 2d 477, 558 NYS 2d 163 (2d Dep't 1990) the Appellate Court expressly upheld the validity of a condition imposed upon grant of a variance in a single family residence zone, which permitted a dwelling to be

utilized for two dwelling units and a store, so long as the owner resided in one of the dwelling units. The Court found the condition to be reasonably related to the underlying zoning code. ***Id.*** In addition, in ***Kasper v Town of Brookhaven***, 142 Ad 2d 213, 535 NYS 2d 621 (2d Dep't 1988) the Second Department upheld a condition placed by the Zoning Board on accessory apartments, to the effect that the primary home be owner occupied.

In the case at bar, the developer was granted the right to build 22 residential units in a marine commercial zone. Where, in the past, an applicant has derived a benefit from a substantial change, the courts have permitted this type of restriction. As set forth in the Village's papers, there is no question that the developer, which formed and runs the Plaintiff herein (the HOA) received a substantial benefit in return for the condition that the Village seeks to enforce. Such conditions have not been declared either unlawful nor unconstitutional in this State. It is not the role of the trial Court to make public policy. Accordingly, as the conditions are not deemed unlawful nor unenforceable, the Village's motion to dismiss the complaint of the HOA, based on documentary evidence pursuant to **CPLR 3211 (a) (1)** is granted.

In making this determination, the Court has not determined whether the owner occupancy condition is applicable to the individual condominium unit owners, not owned by the developer. As set forth in the case of ***Westmorland Association , LTD v West Cutter Estates LTD***, *174 AD 2d 144, 579 NYS 2d 413 (2d Dep't 1992)*, there are several factors that must be met before a homeowner's association will be permitted to assert the rights of individual homeowners within a development for the purpose of attacking a zoning regulation. These include whether full participating membership is available to the residents whose rights are sought to be represented. ***Westmorland*** *at 150, 416.* Under the current circumstances, this is not the case since the developer, by its own by laws controls the HOA. While the HOA has raised the issue, none of these persons has joined or appeared in this action and the Court is not in the position to issue an advisory opinion on this matter.

This constitutes the ***DECISION*** and ***ORDER*** of the Court.

Dated: February 14, 2008
Riverhead, New York

Emily Pines
EMILY PINES
J. S. C.